IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Case No. 05-cv-329-GKF(PJC)**
	)	
TYSON FOODS, INC., et al.,	)	
	)	
Defendants.	)	

STATE OF OKLAHOMA'S RESPONSE IN OPPOSITION TO "CERTAIN DEFENDANTS' JOINT MOTION TO VACATE PARTIAL CONSENT DECREE (DOC. NO. 2107)" [DKT #2135]

The State of Oklahoma ("the State") respectfully requests that "Certain Defendants' Joint Motion to Vacate Partial Consent Decree (Doc. No. 2107)" [Dkt. #2135] be denied in its entirety for the reasons set forth below.

I. Introductory Statement

Defendants have filed a motion pursuant to Fed. R. Civ. P. 59(e) to vacate this Court's May 19, 2009 Order entering the Partial Consent Decree [Dkt. #2107] ("Consent Decree") between the State and Willow Brook Foods, Inc. ("Willow Brook"). As the basis for their Motion, Defendants argue that the State "fail[ed] to adhere to required procedures and to provide the evidentiary support necessary for the PCD's endorsement by this Court." *See* Motion, p. 5. Defendants' arguments do not stand up to scrutiny. First, contrary to Defendants' assertion, nothing in CERCLA requires that the State comply with the notice and comment provisions of 42 U.S.C. § 9622. And second, Defendants have identified no valid substantive flaws in the Consent Decree. Specifically, they have not put forward any valid substantive basis why the Consent Decree should not have been approved either in their Motion or in the nearly two months since the Consent Decree has been on file with Court. Put another way, Defendants'

Motion is a hollow procedural maneuver, an attempt to derail a perfectly appropriate arms-length settlement between two parties. Defendants' Motion should therefore be denied.

II. Statement of Facts

On June 13, 2005, the State filed suit against Defendants, including Willow Brook, for their alleged pollution of the Illinois River Watershed ("IRW"). *See* Dkt. #2-1. In this action, the State has sought, without limitation, injunctive relief, response costs, natural resource damages and restitution / disgorgement under theories sounding in CERCLA, RCRA, state and federal common law, state statutory law and unjust enrichment. *See* Dkt. #1215 (Second Amended Complaint). It cannot be reasonably disputed that the State's injuries in the IRW are indivisible.

In comparison to the other Defendants, Willow Brook had a small presence in the IRW and that presence was comparatively short in duration. *See, e.g.*, Dkt. #1612 (Aff. of Mike Briggs).

On December 17, 2007, this Court appointed Chief Judge Claire Eagan as the settlement judge for this action. *See* Dkt. #1412. Arms-length negotiations between the State and Willow Brook proceeded under the Court-ordered settlement process over the course of many months. On May 8, 2009, the State and Willow Brook entered a Consent Decree. *See* Dkt. #2038-2. The Consent Decree resolved the State's pending claims[1] against Willow Brook for Willow Brooks' alleged pollution of the IRW, as well as the State's unfiled claims against Willow Brook for Willow Brook's alleged pollution of the Grand Lake Watershed. *See id.* In return for an

[1] Contrary to Defendants' suggestion, *see, e.g.*, Motion, p. 1, the State has resolved more than simply a CERCLA claim against Willow Brook. The State's claims sound not only in CERCLA, but also in RCRA, state and federal common law, state statutory law and unjust enrichment. *See* Dkt. #1215.

agreement by Willow Brook, *inter alia*, (1) not to land apply poultry waste in the future in any watershed located in whole or in part in Oklahoma, (2) to provide the State with access to any future Willow Brook poultry growing operations located in whole or in part in a watershed in Oklahoma, (3) to comply with certain reporting requirements with respect to any future Willow Brook growing operations located in whole or in part in a watershed in Oklahoma, and (4) to make a payment to the State of $120,000,[2] the State agreed to release Willow Brook from certain claims and that under applicable law Willow Brook would be entitled to contribution protection with respect to the State's claims. *See id.*

The Consent Decree was filed with the Court on May 12, 2009, together with a motion and memorandum requesting that this Court enter the Consent Decree. *See* Dkt. #2037 & #2038. In that memorandum, the State and Willow Brook set forth details pertaining to the settlement. *See* Dkt. #2038. On May 19, 2009, this Court entered the Consent Decree. *See* Dkt. #2107.

III. Argument

A. Defendants have failed to identify any *required* procedure that the State has failed to comply with in connection with its submission of the Partial Consent Decree

Relying upon CERCLA § 122, 42 U.S.C. § 9622, Defendants argue that the State "deprived the Defendants and the public of procedural and substantive rights relating to the [Partial Consent Decree]." *See* Motion, p. 5.[3] Specifically, Defendants argue that CERCLA §

[2] The Consent Decree provides that the $120,000 be allocated as follows: $45,781 for response costs in the IRW, $25,687 for response costs in the Grand Lake Watershed, $28,906 for natural resource damages, $3,437 for expenses, and $16,189 for attorney fees. *See* Dkt. #2038-2.

[3] Defendants nowhere explain how they have standing to assert a claim on behalf the public that there has been an alleged deprivation of the public's procedural and substantive rights relating to the Partial Consent Decree. Quite obviously, Defendants do not have standing to do so.

122 required the State to undertake a notice and 30-day comment period. CERCLA § 122, however, contains no such requirement.[4] CERCLA § 122, by its plain language, applies only to settlements between the federal government and private parties. *See* 42 U.S.C. § 9622.

Courts have specifically held that CERCLA § 122 does not apply to settlements between states and private parties. *See State of Arizona v. Components, Inc.*, 66 F.3d 213, 216 (9th Cir. 1995) ("The fatal flaw with Components' argument, however, is that section 9622 [CERCLA § 122] applies only to settlements entered into between the United States and potentially responsible parties. It has no bearing on settlements between states and potentially responsible parties. This is clear from the plain language of the statute."); *City of Bangor v. Citizens Communications Co.*, 532 F.3d 70, 99 (1st Cir. 2008) ("Section 122 of CERCLA plainly applies to settlements involving the United States, and the third and fourth parties have presented no convincing argument why we should disregard the clear language of the statute and extend it to settlements involving states and state agencies."); *Utah v. Kennecott Corp.*, 232 F.R.D. 392, 398-99 (D. Utah 2005) (CERCLA does not require a public comment period for any settlement agreements or consent decrees brought by State Trustees."). As such, the fact that the Partial

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[4] Defendants complain that if the State's claims do not properly fall within CERCLA, then granting Willow Brook a release from the State's CERCLA claims and protection from CERCLA contribution claims pertaining to the releases at issue in this case "is completely improper." *See* Motion, p. 7. This complaint is a non-starter. First, settling parties routinely compromise and release claims that turn on yet-to-be resolved legal issues in a case. Indeed, one of the factors that the Tenth Circuit considers in determining the fairness of consent decrees in the class action context is whether "serious questions of law and fact exist, placing the ultimate outcome of the litigation in doubt . . . ." *Rutter & Wilbanks Corp. v. Shell Oil Co.*, 314 F.3d 1180, 1188 (10th Cir.2002). And second, in the event that the Court subsequently determines that CERCLA is inapplicable to the State's claims against the remaining Defendants, then it would necessarily follow that Defendants would have no CERCLA contribution claims and Willow Brook's protection from CERCLA contribution claims by Defendants would not come into play.

Consent Decree was on file with the Court less than 30 days before the Court entered it is of no legal consequence.

Moreover, nothing in the Oklahoma Contribution Among Tortfeasors Act, 12 Okla. Stat. § 832, requires that a proposed consent decree be subject to a notice and comment period. Rather, all that is needed in order to trigger the contribution protections of this Act is that the release, covenant not to sue, or a similar agreement be "given in good faith." *See* 12 Okla. Stat. § 832(H). In their Motion, Defendants have not provided any evidence that the mutual promises between the State and Willow Brook set forth in the Consent Decree, negotiated under the auspices of Chief Judge Eagan,[5] were not given in good faith.

In any event, it should not be overlooked that the Consent Decree has now been on file with the Court for nearly two months and, aside from Defendants' Motion, there have been no objections to entry of the Consent Decree. No third party has sought to intervene in order to challenge the Consent Decree. And Defendants themselves, by filing their Motion, have voiced their (largely procedural) objections and comments which have been considered by the State and will be considered by the Court. Thus, there is no prejudice to Defendants or any third party in the fact that CERCLA § 122's inapplicable 30-day notice and comment period was not strictly observed.

B. The Consent Decree meets the requirements necessary for its entry

[5] Chief Judge Eagan's role as settlement judge is itself strong indicia that the Consent Decree is fair and reasonable. *See, e.g., Wilkerson v. Marietta Corp.*, 171 F.R.D. 273 (D. Colo. 1997) (considered the "quality and reputation of the Mediators" in deciding that the settlement negotiations there were fair and honest). Chief Judge Eagan has decades of legal and judicial experience, and an impeccable reputation. Her presence as settlement judge gives credibility to the negotiations and to the ultimate accord reached between the State and Willow Brook.

Defendants raise two interrelated complaints regarding the Consent Decree. First, Defendants assert that the State has not demonstrated that the Willow Brook settlement bears any relation to its alleged liability. *See* Motion, pp. 9-11. And second, Defendants assert that the State has not demonstrated the adequacy of the Willow Brook settlement. *See* Motion, pp. 11-13. These arguments are entirely procedural make-weight because nowhere in their Motion do Defendants actually argue that the Willow Brook settlement does not in fact bear a relation to its alleged liability. Nor do Defendants actually argue that the Willow Brook settlement is inadequate. As such, and for the reasons set forth below, Defendants' complaints should be rejected.

When consent decrees are forged (at least in the CERCLA context), "the trial court's review function is only to 'satisfy itself that the settlement is reasonable, fair, and consistent with the purposes that CERCLA is intended to serve.'" *United States v. Cannons Engineering Corp.*, 899 F.2d 79, 85 (1st Cir. 1990) (citation omitted). "When a court considers approval of a consent decree in a CERCLA case, there can be no easy-to-apply check list of relevant factors," *id.* at 86, and "approval of a consent decree is committed to the trial court's informed discretion." *Id.* at 84. "The reviewing court must . . . keep in mind the strong policy favoring voluntary settlement of litigation." *United States v. Fort James Operating Co.*, 313 F. Supp. 2d 902, 907 (E.D. Wisc. 2004). "The test is not whether th[e] court would have fashioned the same remedy nor whether it is the best possible settlement." *Id.* There is no need for a trial court to hold an evidentiary hearing on a CERCLA consent decree, and in fact requests for evidentiary hearings with respect to consent decrees in environmental cases are "routinely denied." *See United States v. Charles George Trucking, Inc.*, 34 F.3d 1081, 1085 (1st Cir. 1994) (citations omitted). Significantly, trial courts do not require a high level of specificity in order to approve a consent

decree. *See, e.g., Charles George Trucking*, 34 F.3d at 1088 ("We do not believe that substantive fairness required a more detailed explanation of either the allocation or the allocation method").

Moreover, given that CERCLA encourages settlements, lenient settlements with willing parties quick to the negotiation table are not disfavored under the statute or by the courts. *See, e.g, Fort James*, 313 F. Supp. 2d at 908 ("[g]iven CERCLA's statutory preference for settlement, it is not improper for the government to discount its potential claim to achieve an early settlement."); *In re Tutu Water Wells CERCLA Litigation*, 326 F.3d 201, 208 (3rd Cir. 2003) ("[I]t makes sense for the government, when negotiating, to give a potentially responsible party a discount on its maximum potential liability as an incentive to settle. Indeed, the statutory scheme contemplates that those who are slow to settle ought to bear the risk of paying more.") (quotations and citations omitted); *United States v. Davis*, 261 F.3d 1, 26 (1st Cir. 2001) ("Discounts on maximum potential liability as an incentive to settle are considered fair and reasonable under Congress's statutory scheme," [and] "[i]t is appropriate 'to factor into the equation any reasonable discounts for litigation risks, time savings, and the like that may be justified.'") (citations omitted); *In re Acushnet River & New Bedford Harbor*, 712 F. Supp. 1019 (D. Mass. 1989) ("AVX deserves, and the sovereigns apparently have seen fit to award, a lower settlement amount for its having negotiated in good faith early on. If this price is no longer available to the other defendants, they have only themselves to blame; and if the SARA amendments, with respect to contribution, leave the remaining defendants on the natural resource damages issue facing greater liability than their pro rata share, 'their dispute is with Congress.') (citation omitted).

Defendants' arguments must be viewed against this legal backdrop. That is, Defendants arguments must be considered in light of: (1) CERCLA's strong policy favoring voluntary settlement of litigation; (2) the fact that courts do not require a high level of specificity in order to approve a consent decree; and (3) courts allowing discounts for early-settling defendants. Against this legal backdrop, Defendants' arguments are easily disposed of.

With respect to the first argument -- that the State has not demonstrated that the Willow Brook settlement bears any relation to its alleged liability -- Defendants feign ignorance of a fact of which they are well-aware: that the poultry operations for which Willow Brook is alleged to be liable were, in comparison to the other Defendants' poultry operations, very small. In fact, State expert witness Dr. Bert Fisher testified at the preliminary injunction hearing, on cross-examination by counsel for the Tyson Defendants, that "Willowbrook [has] relatively limited operations." *See* Ex. A (P.I. Transcript, 367:6-7). In this regard, Willow Brook: (1) has never owned a poultry grow-out operation in the State of Oklahoma or in the IRW; (2) had contracts with just two poultry growers within the IRW at the time this case was initiated; (3) from early 2007 through March 2008, had a single contract with just one poultry grower within the IRW; and (4) has had no birds in the IRW since June 30, 2008. *See* Dkt. #1612 (Aff. of Mike Briggs). By contrast, in 2007 alone, over 83 million of the Tyson Defendants' birds were raised within the IRW. *See,* Dkt. ##2065-14 (Tyson Foods' Second Amended Answers to Interrog. 1); 2065-15 (Tyson Chicken's Second Amended Answers to Interrog. 1); 2065-16 (Tyson Poultry's Second Amended Answers to Interrog. 1); and 2065-17 (Cobb-Vantress's Second Amended Answers to Interrog. 1). Additionally, while Defendants feign ignorance of the fact that time of Willow Brook's presence in the IRW was comparatively short in duration, this fact was made known to them in the course of discovery. *See, e.g.,* Ex. B (Willow Brook Foods, Inc. Supplemental

Response to State of Oklahoma's October 11, 2007 Set of Requests to Admit and Requests for Production, Response to Request for Production No. 1) (indicating that Willow Brook contracted with poultry growers within the IRW from 1999 through March 2008). In light of these facts, it is entirely reasonable to conclude that Willow Brook's liability would be much smaller compared to any of the other Defendants.

With respect to the second argument -- that the State has not demonstrated the adequacy of the Willow Brook settlement -- Defendants' position is particularly curious. In their Motion, pp. 12-13, Defendants argue (incorrectly) that the State cannot prove causation against any of Defendants. Under the "logic" of Defendants' (incorrect) argument, however, the State's claim against Willow Brook would be valued at $0. Therefore, under Defendants' reasoning, any settlement in excess of $0 would have to be *per se* adequate. The fact of the matter is that, given Willow Brook's comparatively small and short-duration presence in the Illinois River Watershed, given that it no longer operates in the Watershed and that it agrees to abide by significant restrictions on poultry waste management if it ever decides to resume operations, and given that it was the first Defendant to settle and hence was given a discount, the settlement with Willow Brook is entirely adequate.

In sum, the Consent Decree is "reasonable, fair, and consistent with the purposes that CERCLA is intended to serve," *see Cannons Engineering Corp.*, 899 F.2d at 85, and Defendants have not shown otherwise.

C. The injunctive relief agreed to by Willow Brook is not "illusory and meaningless"

Defendants cynically argue that because it presently has no poultry operations and has no intention of resuming such operations, Willow Brook's agreement in the Consent Decree to certain injunctive relief with respect to any future poultry operations it owns or operates under

contract is "illusory and meaningless."[6] *See* Motion, pp. 13-14. The basis of this assertion is the statement in a provision in the Consent Decree that Willow Brook "has ceased all of its poultry operations and has no intention of resuming them." *See* Dkt. #2107 (Consent Decree, ¶ 3). Defendants ignore the fact that intentions can change. Willow Brook made no promise in the Consent Decree to never in the future resume poultry operations, and it is not beyond possibility that Willow Brook might in the future resume poultry operations. (For example, Defendant Cal-Maine exited the Illinois River Watershed in 2006 only to resume operations through an asset purchase in 2007.)

One of the central goals of this litigation is to stop the present and future pollution of the waters of the State from poultry waste. The way to achieve that goal is have Defendants -- including Defendant Willow Brook -- agree that they will now and forever not engage in conduct that threatens the State's water resources. Such an agreement is therefore of significant value to the State, and is perfectly appropriate under the law. "Mere voluntary cessation of allegedly illegal conduct does not moot a case; if it did, the courts would be compelled to leave '[t]he defendant . . . free to return to his old ways.' " *United States v. Phosphate Export Assn.*, 393 U.S. 199, 203 (1968) (quoting *United States v. W.T. Grant Co.*, 345 U.S. 629, 632 (1953)). In short, Defendants' argument with respect to the injunctive relief provided for in the Consent Decree should not be credited.

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[6] As part of the Consent Decree, Willow Brook agreed, *inter alia*, (1) to assume legal and financial responsibility for the proper management, storage, land application and disposition of poultry waste generated at any future poultry operations it owns or operates under contract in any watershed located in whole or in part in Oklahoma, (2) not to land apply in any watershed located in whole or in part in Oklahoma any poultry waste generated at any future poultry operations it owns or operates under contract, (3) to provide the State with access to any future poultry operations it owns or operates under contract in any watershed located in whole or in part in Oklahoma for purposes of monitoring compliance, and (4) to make reports to the State with respect to any future poultry operations it owns or operates under contract in any watershed located in whole or in part in Oklahoma.

D. The payment mechanism provided for in the Consent Decree is consistent with the law

Defendants argue that the State's method for collecting and managing the funds to be paid by Willow Brook under the settlement "raises serious questions under both Oklahoma public finance law and CERCLA." *See* Motion, p. 15. Defendants' argument fails. First, the State's method for collecting and managing the settlement funds is consistent with Oklahoma law. Second, the State's method for collecting and managing the settlement funds is consistent with CERCLA.

The Consent Decree provides that the Willow Brook settlement funds be placed in a trust account to be established by the Attorney General called the Poultry Litigation Environmental Trust, and disbursed in accordance with the terms of the Consent Decree. This method of collecting and managing the settlement funds is fully consistent with Oklahoma law. Under 62 Okla. Stat. § 7.2, a certain "Special Agency Account Board" is empowered to "approve the establishment of agency special accounts in the official depository of the State Treasury." In particular, the Special Agency Account Board may approve such agency special accounts for money received by state agencies, including "[f]unds for which the state agency acts as custodian . . . ." 62 Okla. Stat. § 7.2(C)(8). Under these provisions of Oklahoma law, the establishment of the Poultry Litigation Environmental Trust and placement of settlement funds in that Trust is entirely appropriate.

Defendants' argument that Willow Brook's payment of $16,189 for attorneys fees conflicts with CERCLA is flawed. Just as with the amounts for natural resource damages, response costs, and expenses, the amount of attorney's fees was a separately negotiated payment item and separately delineated in the Consent Decree. Thus, even assuming arguendo that CERCLA precludes the use of any CERCLA natural resource damages recovery for payment of

attorneys fees,[7] there is nothing in the record to support a conclusion that the attorneys fees are being paid out of the natural resource damages recovery. Moreover, the State and Willow Brook settled claims arising from activities in the Grand Lake watershed, for which the State has not yet filed suit. Nothing in CERCLA constrains the manner in which the parties settle claims in another watershed for which suit has yet to be filed.

E. Defendants are not entitled to attorney's fees and costs associated with their Motion

Not only do Defendants seek to vacate the Consent Decree and require the State to go through a legally-unnecessary notice and comment process, but also they seek attorney's fees and costs associated with their Motion. Defendants cite no authority in support of this request, and it should be summarily denied.

IV. Conclusion

WHEREFORE, in light of the foregoing, Defendants' Motion should be denied.

Respectfully submitted,

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[7] Given that they dispute that CERCLA even applies in this case, Defendants are at any rate estopped from making this argument.

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CERTIFICATE OF SERVICE

I certify that on the 9th day of July, 2009, I electronically transmitted the attached document to the Clerk of Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants:

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